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NO. 99-1279

IN THE SUPREME COURT OF THE UNITED STATES

BRENT SWENSON AND LORILEI SWENSON,

PETITIONERS,

v.

WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION III

BRIEF IN OPPOSITION

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The respondent, Washington Department of Social and Health Services, respectfully requests that this Court deny the petition for a writ of certiorari in this case.

STATEMENT

Hannah Swenson was born November 22, 1992. She was first placed outside the home of the parents, Brent and Lorilei Swenson, under a voluntary placement agreement in December 1992. Pet. App. at A-2. The juvenile court placed Hannah in shelter care under a stipulated order signed by the parents and their attorneys, put on the record before the judicial officer, and entered March 16, 1993. Pet. App. at A-2.

Hannah was made dependent by Agreed Order of Dependency and Disposition entered May 3, 1993, as to the father, and June 16, 1993, as to the mother (who agreed to dependency partway through a trial on the allegations set forth in the dependency petition). Pet. App. at A-2. The court found Hannah to be dependent pursuant to Wash. Rev. Code § 13.34.030(2)(b) (abuse or neglect) and (c) (no parent capable).[1]

The dependency court made specific, concrete, and detailed findings documenting neglect of the baby's needs and the biological parents' inability to care for her, and it entered dispositional orders setting forth remedial services. The dependency findings included: Insufficient emotional stability on the biological parents' parts to meet Hannah's physical and emotional needs; thought disorders/mental illness in the biological parents precluding lack of adequate care for the child; lack of bonding with the baby; clinically verified failure to thrive on the baby's part, combined with

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[1] Wash. Rev. Code 13.34.020(2) has since been renumbered as (4) by 1994 Wash. Laws ch. 288, § 1. Wash. Rev. Code 13.34.020(2)(b) defined a dependent child as one who was abused or neglected by a person legally responsible for that child's care. Wash. Rev. Code 13.34.030(2)(c) defined a dependent child as one "[w]ho has no parent, guardian, or custodian capable of adequately caring for the child".

failure to feed the baby with sufficient flexibility to meet her nutritional needs; and inability or unwillingness to cooperate with providers sufficiently to remedy these problems.

Following the statutes then in place, the Department of Social and Health Services, Division of Family Services (DSHS/DCFS) developed a permanent plan.[2]

Under Washington's statutory provisions, the dependency and termination matters are separate proceedings. *Compare* Wash. Rev. Code § 13.34.030 (definitions of dependent child) *and* Wash. Rev. Code § 13.34.040 (dependency petition) *with* Wash. Rev. Code § 13.34.180 (separate petition and service for termination petition).[3] DSHS/DCFS's assigned social worker filed a petition for termination of parental rights October 27, 1993. The petition was filed because the biological parents were

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[2] As in effect at that time (prior to passage of the Adoption and Safe Families Act of 1997, P-L 10589, amending the federal child welfare law and moving cases through the child welfare system more quickly so as to ensure children do not languish in foster care), Wash. Rev. Code § 13.34.145 mandated that:

> "A permanency plan shall be developed no later than sixty days from the time the supervising agency assumes responsibility for providing services, including placement of the child, or at the time of a hearing under [Wash. Rev. Code §] 13.34.130, whichever occurs first. The permanency planning process continues until a permanency planning goal is achieved or dependency dismissed. The planning process shall include reasonable efforts to return the child home." Wash. Rev. Code § 13.34.145(1).

No dependency may be dismissed until the child has been returned home by court order and monitored there for six months. Wash. Rev. Code §§ 13.34.130(7)(a), .145(7); *accord* Pet. App. at A-11.

[3] Given that dependency and termination proceedings are separate in that they have separate purposes and elements, each requires separate notice via service of a petition and a summons. Wash. Rev. Code §§ 13.34.070, .180.

making little progress in extensive services, remained unable to care adequately for Hannah in their home, and were contemplating relinquishment. By the date of filing, Hannah had been out of her biological parents' home by court order for seven months.[4] She resided with relatives approved initially by the parents (where she remains today). Pet. App. at A-2. The petition for termination of parental rights was voluntarily dismissed by the state when the biological parents decided they wished to further pursue reunification and appeared to be making some progress. *See* Pet. App. at C-10 (finding by the trial court at the termination proceedings that "development of the case over time required further investigation and opportunities for participation by the parents").

The court ordered visitation as part of the initial dependency disposition and in the review orders. Numerous expansions occurred—based variously on discretion of the social worker and the child's guardian ad litem, stipulated court orders, and court orders subsequent to contested review hearings and motions. Pet. App. at A-3. Each time, visits were subsequently reduced by court order, based on combinations of the biological parents' stress from visits and

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[4] Hannah had not been adjudicated a dependent child for six months at the time the first termination petition was filed. The petitioners contend that a petition cannot be filed until a child has been out of the home for six months. Pet. at 8. In actuality, the statute contains no such prohibition. Rather, it provides that the agency may file a petition for termination of parental rights at any time following the establishment of dependency. Wash. Rev. Code § 13.34.145(10). The termination proceedings may not be held, however, until the parents have had six months under a dependency to remedy parental deficiencies, as the state must prove at the termination proceedings by clear, cogent, and convincing evidence:

> "That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency". Wash. Rev. Code § 13.34.180(3).

harm to the child's health, safety, and welfare. Pet. App. at A-3, C-9, C-10; Br. Opp'n App. A at 6a ¶ 1.10, 7a ¶ 2.2.

Throughout the dependency proceedings of more than three years duration, the court conducted regular reviews, many of them contested, at which the state re-proved grounds for dependency.[5] At all times the parents were represented by counsel, had full access to the court, were informed of the agency's position through individual service plans, and appeared as well as litigated at numerous dependency review hearings. Serious parental deficiencies persisted in the biological parents; the parents' progress or lack thereof was detailed by numerous judicial officers in their dependency review findings and upon determination of various motions brought by the parties. The initial problems identified by the court continued to manifest themselves throughout the dependency, although the parents had access to numerous services appropriate to remedy their deficiencies. Pet. App. at A-3, 4, 7, 12-13, 16-17 (deficiencies); Pet. App. at A-8, 9, 16 (services to parents); Pet. App. at A-7 ("denial by both [parents] of the existence of any parenting problems, which is incompatible with successful treatment"); Br. Opp'n App. A at 3a-6a ¶¶ 1.7-1.10.

DSHS/DCFS filed a second petition for termination of parental rights February 22, 1996. Reunification efforts (in the forms of services and visitation) continued under the

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[5] Petitioners rely heavily on commentary from the trial court's oral decisions in their arguments to this Court. These are taken out of context and were superseded by the written orders. Pet. App. C (oral decision not incorporated into the trial court's written findings, conclusions, and order); Br. Opp'n App. A (written order incorporated the oral opinion only to the extent not inconsistent with the written findings). Even if the detailed, written decisions were deemed ambiguous, the dependency and termination court's oral opinions may be used to supplement or amplify, but not to contradict, their written decisions. *Lakeside Pump & Equip., Inc. v. Austin Const. Co.*, 89 Wash. 2d 839, 843 n.1, 576 P.2d 392 (1978); *In re Marriage of Curran*, 26 Wash. App. 108, 611 P.2d 1350 (1980).

dependency at all times until the trial court conducted the termination proceedings. The parents engaged in several contested hearings at dependency reviews and upon motions. The parents "knew at every step of the proceeding what the state's position was". Pet. *App. at A-13.*

After several days of trial in October 1996, the trial court terminated the biological parents' rights to Hannah. It made extensive findings regarding all elements of Wash. Rev. Code §§ 13.34.180-.190 in its written order entered February 3, 1997. Pet. App. at A-13; Pet. App. C.

REASONS WHY THE PETITION SHOULD BE DENIED

This case concerns, at base, the petitioners' beliefs that the trial court erred in its factual determinations and misapplied the law. The petitioners attempt to raise to constitutional magnitude what is essentially a dispute about the sufficiency of the evidence to support the trial court's findings of fact. There is no reason for the Court to grant this petition.

A. Washington Requires Parental Unfitness Be Established By Clear, Cogent, And Convincing Evidence As Set Forth In *Santosky v. Kramer*

1. Washington Requires Clear, Cogent, And Convincing Evidence

Petitioners claim that Washington law conflicts with *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982), which requires a clear and convincing standard of proof to terminate parental rights. Pet. at 20-22. This claim is inaccurate. Wash. Rev. Code § 13.34.190(1) provides that the allegations under Wash. Rev. Code § 13.34.180(1)-(6) contained in a petition seeking to terminate parental rights must be established by "clear, cogent, and convincing evidence". Pet. App. E-6.

Wash. Rev. Code § 13.34.180 sets out the factors that must be established by "clear, cogent, and convincing evidence" to terminate parental rights. The first three elements are historical facts that must be established. First, the state must prove that "the child has been found to be a dependent child under [Wash. Rev. Code §] 13.34.030(4)". Wash. Rev. Code § 13.34.180(1).[6] A "dependent child" is one who as been abandoned, abused, neglected, or who has no parent, guardian, or custodian capable of adequately caring for the child. Wash. Rev. Code § 13.34.030(4).[7]

Second, the state must prove that "the court has entered a dispositional order pursuant to [Wash. Rev. Code §] 13.34.130" regarding placement and providing remedial services and visitation. Wash. Rev. Code § 13.34.180(2). The services' purpose is to enable the parents to resume custody of the child. Wash. Rev. Code § 13.34.130.

Third, the state must prove that "the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency under [Wash. Rev. Code §] 13.34.030(4)". Wash. Rev. Code § 13.34.180(3).

Thus, the state must begin by establishing that the child has been declared dependant; that a dispositional order has been entered and that the child has been removed from custody of the parents for at least six months under a dependency. After these historical facts are established, the state must prove the remaining three factors which go the need to terminate parental rights.

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[6] Wash. Rev. Code § 13.34.030(4) was previously Wash. Rev. Code § 13.34.030(2), but was renumbered by 1994 Wash. Laws ch. 288, § 1.

[7] Renumbered from Wash. Rev. Code § 13.34.030(2) by 1994 Wash. Laws ch. 288, § 1.

Forth, under Wash. Rev. Code § 13.34.180(4), the state must prove that all dispositional services ordered at the initial dispositional hearing and at subsequent review hearings as well as "necessary services reasonably available" have been offered or provided.

Fifth, the state must prove that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future". Wash. Rev. Code § 13.34.180(5). The statute lays out nonexclusive factors that may be considered by the court including: "Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time". Wash. Rev. Code § 13.34.180(5)(b).

Sixth, the state must prove that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home". Wash. Rev. Code § 13.34.180(6).

Each of these factors must be established by "clear, cogent, and convincing evidence". Wash. Rev. Code § 13.34.190(1). Washington interprets the "clear, cogent, and convincing" standard in a manner consistent with *Santosky*, in requiring that the state show the six factors are "highly probable". *E.g.*, *In re K.R.*, 128 Wash. 2d 129, 141-42, 904 P.2d 1132 (1995); *Krause v. Catholic Comm'ty Servs.*, 47 Wash. App. 734, 740, 737 P.2d 280, *review denied*, 108 Wash. 2d 1035 (1987). Washington law conforms exactly to the requirements in *Santosky*.

2. Petitioners' Alleged Conflict With *Santosky v. Kramer* Is Based On A Misstatement Of Washington Law

Petitioners recognize that Washington law requires "clear, cogent, and convincing evidence". Pet. at 20. Despite this fact, they claim Washington violates the *Santosky* standard. Petitioners focus their argument on the

historical factor in Wash. Rev. Code § 13.34.180(1) that a dependency has been established. Petitioners note that a dependency finding can be based on a preponderance of the evidence and that the child shall not be returned home unless the court at a review hearing finds that a reason for removal no longer exists. Pet. at 20. From these facts, petitioners draw the conclusion that under Washington law a parent's rights can be terminated by "clear and convincing proof that [the parents] previously have been unable to prove that there is no reason to keep their child from them". Pet at 20.

This argument misstates Washington law. Parental rights cannot be terminated just because the child is dependant and has not returned home. The state must also prove the second, third, fourth, fifth, and sixth factors. The state must also prove that a dispositional order has been entered and that the parents have had at least six months under a dependency to remedy parental deficiencies. The state must prove that the services required in the dispositional order and review orders, as well as other necessary services, have been offered or provided. The state must prove that there is little likelihood that conditions will be remedied so that the child can be returned to the home in the near future. The state must prove that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. Wash. Rev. Code § 13.34.180(4)-(6).

Wash. Rev. Code § 13.34.180(1) provides protection against arbitrary termination of parental rights, based on less than enduring deficiencies. Read together with Wash. Rev. Code § 13.34.180(2) and (3) (which are unchallenged by the petitioners), Wash. Rev. Code § 13.34.180(1) requires that a dependency be established and that the parents be part of a formal remedial process for at least six months prior to involuntary termination of parental rights. *In re A.W.*, 53 Wash. App. 22, 30, 765 P.2d 307 (1988); *accord Krause*, 47

Wash. App. at 745; *In re Darrow*, 32 Wash. App. 803, 649 P.2d 858, *review denied*, 98 Wash. 2d 1008 (1982).

Petitioners also misstate the reason for the termination in this case. According to petitioners, the termination order was based on the fact "Hannah had not been returned home for more than six months and would not likely be anytime soon". Pet. at 21. This is not accurate. The record herein is replete with evidence of parental unfitness considered during the lengthy trial on the termination petition, adopted by the trial court in its findings of facts and reviewed by the Court of Appeals in its decision. Pet. App. A, C; Br. Opp'n App. A (review findings, conclusions, and order references by the trial court in its termination findings). The parents' basic deficiencies remained the same over the years of the dependency (with limited progress made through remedial services), but changed in their precise manifestations as the child's needs evolved from her infancy through her years as a toddler to those of a pre-schooler. Pet. App. at A-2 to A-5, 12-14, 16-17; Pet. App. C; Br. Opp'n App. A at 2a-6a..

The trial court did not assume or imply that the mere fact of the child's ongoing dependency established the whole of Wash. Rev. Code § 13.34.180. Rather, the trial court ruled that it need not retry the initial dependency (years after the fact) to find that DSHS/DCFS proved Wash. Rev. Code § 13.34.180(1).

The logic behind this determination is that the question posed by Wash. Rev. Code § 13.34.180(1) is a simple one: Was the child made dependent? It is indisputable that Hannah was found dependent. The certified copies of the dependency findings, conclusions, and orders admitted as evidence at the termination proceedings established most basically (beyond the testimony of several witnesses, including the parents themselves) that dependency was established. In turn, Wash. Rev. Code § 13.34.180(1)

was thereby proven.[8] *E.g.*, *In re J.C.*, 130 Wash. 2d 418, 428-29, 924 P.2d 21 (1996); *In re K.R.*, 128 Wash. 2d at 141-42, 145-46; *In re A.W.*, 53 Wash. App. at 30.

While the initial dependency need not be re-established at the termination proceedings, evidence of current parental unfitness is required nonetheless to support termination of parental rights in Washington. *In re J.C.*, 130 Wash. 2d at 428-29; *In re K.R.*, 128 Wash. 2d at 141-42. Wash. Rev. Code § 13.34.180(1) cannot be viewed in a void. Rather, current parental unfitness is established by proving *all* of the elements of Wash. Rev. Code § 13.34.180. In requiring that each of the elements of Wash. Rev. Code § 13.34.180 be proven by clear, cogent, and convincing evidence, Washington meets the requirements of *Santosky*.

3. The Lesser Burden Of Proof To Determine The Best Interest Of The Child Is Consistent With *Santosky v. Kramer*

The state has proven that a parent is unfit when it establishes the six factors in Wash. Rev. Code § 13.34.180(1)-(6) by clear, cogent, and convincing evidence. The court must make one additional finding, however, before

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[8] The parents did not precisely challenge Wash. Rev. Code § 13.34.180(1) previously in their appeal of the termination order. Pet. App. at A-5. Notably, they stipulated to the initial dependency findings, conclusions, and orders. *See Krause*, 47 Wash. App. at 742 n.4 (commentary on the significance of an agreed order of dependency). Additionally, the parents stipulated to several dependency review orders and failed to appeal others—each of those reviews finding that the child remained dependent under the definitions set forth in Wash. Rev. Code § 13.34.030; the review process resulted in repeated, updated findings of dependency. Pet. App. at A-11 (citing *In re A.W.*, 53 Wash. App. at 28); Br. Opp'n App. A (review order similar to others entered in this matter in that all included updated findings of dependency). Had the parents wished to do so, the time to appeal matters connected with the dependency proceedings was during the dependency. *In re K.R.*, 128 Wash. 2d at 142 n.7; *In re Chubb*, 112 Wash. 2d 719, 725, 773 P.2d 851 (1989).

it terminates parental rights. The court must determine that an order terminating parental rights "is in the best interests of the child". Wash. Rev. Code § 13.34.190(2). The clear, cogent, and convincing evidence standard does not apply to this finding. Petitioners claim that the burden of proof regarding "best interests" violates *Santosky*. Pet. at 22-24.

Santosky does not support petitioners' argument. In *Santosky*, this Court distinguished between the factual determination of parental unfitness and the disposition of the child under the "best interest of the child" standard. Under the New York statutes in *Santosky*, the "State bifurcates its permanent neglect proceeding into 'fact-finding' and 'dispositional' hearings. At the factfinding stage, the State must prove that the child has been 'permanently neglected' .... The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests." *Santosky*, 455 U.S. at 748 (citation omitted). This Court ruled that the fact finding hearing to determine parental unfitness is not intended to balance the interest of the parent and child to determine what is in the child's best interest. According the Court:

> "At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. *See* Fam. Ct. Act § 631 (judge shall make his order 'solely on the basis of the best interests of the child,' and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship Thus,

> at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures." *Santosky*, 455 U.S. at 760-61 (footnote omitted).

The determination of parental unfitness requires the high standard of proof of clear, cogent, and convincing evidence to ensure protection of the parents' liberty interest in their relationship with their child. Once parental unfitness has been established, a lesser standard of proof is constitutionally permissible to determine the disposition of the child.

Petitioners misconstrue the burden of proof question, as it applies to the "child's best interest" standard of Wash. Rev. Code § 13.34.190, because they misconstrue the purpose of Wash. Rev. Code § 13.34.190. In reality, this section is a protection for parents, providing the trial court a reason to preserve parental rights even if the parents are unfit, if termination of the rights is not in the child's best interests. A more complete citation to the language of *In re Ramquist*, 52 Wash. App. 854, 765 P.2d 30 (1988), *review denied*, 112 Wash. 2d 1006 (1989), than provided by the petitioners illuminates the issue:

> "The burden of proof on the issue of [the child's] best interests is not "clear, cogent, and convincing" evidence, as it is for the elements of [Wash. Rev. Code §] 13.34.180(1)-(6). *See* [Wash. Rev. Code §] 13.34.190. Rather, [Wash. Rev. Code §] 13.34.190(2) gives the trial court discretion not to grant termination even when the petitioner establishes the elements of [Wash. Rev. Code §] 13.34.180(1) -(6) with the requisite degree of proof. *See Santosky v. Kramer*, 455 U.S. 745, 769, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (state must prove parental unfitness by clear and

> convincing evidence); *In re Sego*, 82 Wash. 2d 736, 739, 513 P.2d 831 (1973) (same)." *In re Ramquist*, 52 Wash. App. at 861.

In sum, because Washington's "best interest" standard is not an element of unfitness, it need not be proven by clear, cogent, and convincing evidence.

Under Washington's statutory provisions, and as applied here, Hannah's "best interests" were not decided as an element of the unfitness determination. However, the court could not justify preservation of the relationship after several years of out of home placement in the face of the parental deficiencies subject to no further remedy, combined with the child's need for permanent placement. Pet. App. at C-3. After three and one-half years of services, there was "little or no likelihood" that further intervention would benefit the parents, "much less the child". Pet. App. at C-3.

Furthermore, Hannah was unable to tolerate extensive contact with her parents. Pet. App. at C-9, 10. In 1995, visits were increased to forty hours per week in the parents' home, monitored. Pet. App. at A-3. As was the case in all other expansions of visitation in this case, neither the parents nor the child were able to maintain this schedule due to anxiety. Pet. App. at A-3. Additionally, "[t]he ongoing stress of having no permanent home . . . resulted in somatic complaints and stuttering on Hannah's part." Pet. App. at C-12. She suffered from having parents who could "not meet her emotional requirements or establish clear boundaries". Pet. App. at C-9. Ultimately, Hannah required weekly psychiatric care. Pet. App. at C-7, 11. "At the recommendation of [her] psychiatrist, the court limited visits to three hours per week at the visitation schedule." Pet. App. at A-3. As did other providers who worked with Hannah, her psychiatrist opined that her best interests required

termination of parental rights and adoption. Pet. App. at C-12, 13.[9]

"Courts are always reluctant to deprive parents of rights with respect to their children, and it is particularly sad when the parent cares for the child and desires to be a good parent, as appears to be the case here." *In re Aschauer*, 93 Wash. 2d 689, 695, 611 P.2d 1245 (1980). Indeed, the trial court's written decision and its oral commentary indicate it did not take its decision lightly. The court recognized, however, that continuity and stability had become imperative for Hannah. Pet. App. at C-12, 13-14. In so recognizing, the trial court did not make any finding indicating that current contact would benefit the child.[10] It found that "although some contact between the child and her biological parents may be in her best interests as she grows older, this fact cannot be used to delay permanence indefinitely. This is especially the case given that reunification with the parents is not possible within the foreseeable future." Pet. App. at C-19. Indeed, Hannah requires finality at this time, "as

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[9] As the Court of Appeals noted upon review:

> "The record includes extensive expert testimony that while the parents' capacity for improvement had reached a plateau, the child's condition was deteriorating. [Hannah's] court-appointed guardian ad litem, after spending over 1,500 hours with the family, strongly urged termination for [her] sake. Pamela Aden, engaged by [the parents] to facilitate reunification, also recommended termination. There was testimony throughout that the child's need for resolution, permanence and stability had become urgent. The recommendation was for permanent placement with the foster parents." Pet. App. at A-4.

[10] So long as the elements of Wash. Rev. Code §§ 13.34.180-.190 are established, termination of parental rights is not barred even by a finding that continued contact would benefit the child. *In re A.V.D.*, 62 Wash. App. 562, 572-73, 815 P.2d 277 (1991).

she cannot exist forever in the limbo of temporary care". Pet. App. at C-10.

B. There Are No Important Unresolved Questions Regarding Due Process Limitations On Vagueness In Parental Termination Statutes

Petitioners claim this case presents important unresolved questions regarding due process limitations on vagueness in parental termination statutes. Pet. at 24-28. This argument lacks merit. Petitioners point to Wash. Rev. Code § 13.34.180(5)(b), which requires that the state prove by clear, cogent, and convincing evidence:

> "That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. In determining whether conditions will be remedied the court may consider, but is not limited to, the following factors:
>
> ". . . .
>
> "(b) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care to the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care in the near future". Wash. Rev. Code § 13.34.180(5).

A statute cannot reasonably list each of the ways that a parent might behave so as to support termination of parental rights. Any such attempt risks creation of an exclusive set of factors that would not protect the rights of children to physical and emotional safety and adequate nurture.

1. Washington Law Is Consistent With Numerous Decisions That Reject Vagueness Challenges To Parental Termination Laws

Washington's law is consistent with numerous decisions that reject vagueness challenges to parental termination provisions. Indeed, petitioners concede that "the majority of . . . case[s] have upheld necessarily general statutory provisions governing termination issues against [vagueness] challenges". Pet. at 26-27.

So long as the statutes provide guarantees against arbitrary results in terminating parental rights, an extremely wide variety of approaches have been upheld as satisfying due process. Wanda Ellen Wakefield, Annotation, *Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R.4th 774 (1983 & Supp. Sept. 1999). Statutes using various terms to describe the elements of parental unfitness have been upheld in the context of individual states' statutory schemes. *E.g.*, *In re Cody W.*, 31 Cal. App. 4th 221, 36 Cal. Rptr. 2d 848 (1994), *cert. denied*, 516 U.S. 825 (1995) (failure to define physical or emotional "detriment" in the dependency statute did not make it unconstitutionally vague, and mother's argument that the termination court failed to find unfitness was unsupported in the record); *In re J.J.*, 366 Pa. Super. 94, 530 A.2d 908 (1987) (termination statute using the phrase "repeated and continued incapacity or neglect" was not unconstitutionally vague); *Matter of J.H.*, 468 N.E.2d 542 (Ind. App. 1984) (statute allowing termination was not unconstitutionally vague based on following elements: child in need of services had been removed from the home for at least six months under a disposition order and there was reasonable probability that conditions that resulted in the child's removal from the home would not be remedied; clarity and intent of statute were apparent when read in context of the statute defining a child in need of services); *In re M.B.C.*, 125 Ill. App. 3d 512, 466 N.E.2d 273 (1984), *appeal dismissed*, 471

U.S. 1062 (1985) (statute allowing deprivation based on "depravity" was not overly vague in that additional definition would limit the trial court's focus to the unique facts of each case before it); *accord, e.g., In re B.C.*, 356 N.W.2d 328 (Minn. App. 1984); *People v. D.A.K.*, 198 Colo. 11, 596 P.2d 747, *appeal dismissed*, 444 U.S. 987 (1979) (terms "abuse" or "mistreat" not unconstitutionally vague); *In re Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979) (inability to perform "parental responsibilities" and exercise "proper parental control" not unconstitutionally vague); *In re William L.*, 477 Pa. 322, 383 A.2d 1228, *cert. denied, Beatty v. Lycoming Cy. Children's Servs.*, 439 U.S. 880, *and cert. denied, Lehman v. Lycoming Cy. Children's Servs.*, 439 U.S. 880 (1978) (termination based on showing that conditions justifying removal could or would not be remedied was constitutional).

Of particular relevance to this case, many states hold that termination is constitutionally proper upon showing, pursuant to statute, that the parent will remain incapable of caring for the child due to manifestations of or conduct related to mental illness. *State v. Smith*, 785 S.W.2d 336 (Tenn. 1990) (due process satisfied upon clear and convincing evidence that mentally ill mother failed to remedy "conditions" that led to removal of the child after several months; court refused to add a judicial gloss of "willful" conduct to the statute); *Interest of L.G.*, 764 S.W.2d 89 (Mo.), *cert. denied*, 491 U.S. 909 (1989) (statute was not unconstitutionally vague in that it required consideration of four "conditions"; court rejected mentally ill parent's contention that statute violated due process in that it did not require proof of actual or likely harm beyond that shown in the dependency, although evidence did indicate nonetheless a showing of additional potential harm); *In re Christina A.*, 213 Cal. App. 3d 1073, 261 Cal. Rptr. 903 (1989) (statute not unconstitutionally vague in allowing termination of parental rights in that it defined mental disability as "any mental incapacity or disorder which renders parent . . . unable to adequately care for or control the child" and protected

against arbitrary enforcement); *Matter of Gentry*, 142 Mich. App. 701, 369 N.W.2d 889 (1985) (mother's mental illness supported termination of parental rights despite vagueness claim that the statutes did not permit a person of ordinary intelligence to discern prohibited behavior in that there was strong evidence of neglect by the mother at birth and the mother suffered from twenty years of mental problems; additionally, the following terms used in the statute had been sufficiently delineated by the courts to withstand the vagueness challenge: "proper", "unfit home", "fit home", "mental deficiency or mental illness", and "reasonable expectation"); *Matter of Joyce T.*, 65 N.Y.2d 39, 489 N.Y.S.2d 705, 478 N.E.2d 1306 (1985) (statute allowing termination based on current and likelihood of future manifestations of mental illness making parent unable to provide proper and adequate care did not violate due process or equal protection provisions in that the statute provided significant protections and did not authorize termination based on status as mentally ill but rather on conduct demonstrating inability to care for the child); *Thompson v. Arkansas Soc. Servs.*, 282 Ark. 369, 669 S.W.2d 878, *appeal dismissed*, 469 U.S. 926 (1984) (statute must be cast sufficiently broadly to encompass all proscribed behavior and was not unconstitutionally vague where court may consider long-standing mental illness); *In re Interest of Spradlin*, 214 Neb. 834, 336 N.W.2d 563, *cert. denied*, 464 U.S. 1011 (1983) (termination statute not unconstitutionally vague in allowing deprivation when parents were found unable to discharge their parental responsibilities due to prolonged mental illness since it provided adequate standards and decisive factor was effect of mental illness on the parents' ability to care for the child); *In re Sylvia M.*, 82 A.D.2d 217, 83 A.D.2d 925, 443 N.Y.S.2d 214 (1981), *aff'd, Matter of Guardianship & Custody of Nereida S.*, 57 N.Y.2d 636, 454 N.Y.S.2d 61, 439 N.E.2d 870, *reargument denied, Matter of Nereida S.*, 57 N.Y.2d 775, 454 N.Y.S.2d 1033, 440 N.E.2d 1343, *and reargument denied*, 57 N.Y.2d 775, 454 N.Y.S.2d

1033, 440 N.E.2d 1343 (1982) (termination statute was not unconstitutionally vague in providing for deprivation when parents were unable to care for their children for the "foreseeable future" due to "mental illness" placing the children in "danger of becoming neglected" and of not receiving "proper and adequate care"); *In re David B.*, 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979) (termination upheld even in absence of evidence that the mother had abused or neglected her child where evidence showed that the mental illness could be expected to continue regardless of medical treatment; deprivation was determined to be the least detrimental alternative for the child).

Washington law is consistent with these decisions. There are no due process questions that require resolution by this Court.

2. The Due Process Decisions Cited By Petitioners Were Decided Prior To *Santosky v. Kramer* And Are Unique To Their Context

Petitioners cite three decisions to support their claim that this case presents important unresolved due process issues related to vagueness in parental termination statutes. Pet. at 27-29. The cases cited by petitioners in support of their vagueness challenge are dated and unique to their contexts. The statutory schemes they concern bear little resemblance to Washington's provisions and the body of case law interpreting those provisions. Notably, each of the decisions cited by petitioners in support of their vagueness arguments was authored prior to *Santosky*, which provided a framework regarding parental unfitness under the "clear, cogent, and convincing standard". The three cases take basically the (subsequently disfavored) stance that, essentially, the Legislature must make a list of proscribed conduct.

Alsager v. District Court of Polk County, Iowa (Juvenile Division), 406 F. Supp. 10, 18 (S.D. Iowa 1975),

opinion adopted by Alsager v. District Court of Polk County, Iowa, 545 F.2d 1137 (8th Cir. 1976), cited by petitioners, has been substantially distinguished; furthermore, the case involved a statute without judicial gloss—a situation not comparable to Washington's well-establish statute and case law interpreting it.[11] Notably, "[t]his district court opinion was affirmed on other grounds, the [Eighth Circuit Court of Appeals] specifically noting that 'there is no collateral estoppel effect to be afforded the district court's resolution of [the vagueness] question.'" *Interest of Ponx*, 276 N.W.2d 425, 431 (Iowa 1979) (quoting *Alsager*, 545 F.2d at 1138).[12]

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[11] The practices at issue in *Alsager* bear little resemblance to Wash. Rev. Code 13.34 or to the circumstances of the Swenson case. In *Alsager*, the children were adjudicated "neglected" one week after their removal from their parents' home, and a termination petition was filed less than one month after the neglect determination. *Alsager*, 406 F. Supp. at 13-14. The parents had counsel only intermittently. *Id.* at 14. The parents challenged the clarity of the statutory determinations that they "refused to give the child necessary parental care and protection" and were "unfit . . . by reason of . . . conduct . . . detrimental to the physical health or morals of the child". *Id.* at 18. In addition, the parents challenged several other defects, alleging that: They were not provided adequate notice of the termination proceedings; the standard of proof applied to unfitness determinations was "preponderance of the evidence" only; evidentiary standards were ignored; and impermissible ex parte communications may have occurred. *Id.* at 15.

The federal district court ruled on these issues because the Iowa Supreme Court had failed to narrow the construction in its prior deprivation cases or in the earlier appeal of the Alsagers' own case. *Id.* at 21. In turn, the Eighth Circuit Court of Appeals ruled specifically that it did not need to reach and did not reach the vagueness and overbreadth attacks upon the facial validity of the termination statute or the appropriate standard of proof at termination proceedings. *Alsager*, 545 F.2d 1137.

[12] The Eighth Circuit Court of Appeals invited Iowa courts to place a limiting interpretation on the statutory provisions at issue. *Alsager*, 545 F.2d at 1137-38. Thereafter, in *Interest of Ponx*, 276 N.W.2d at 429-32, the court held that "necessary parental care and protection" were not vague when, as in most cases, the parents were well-informed of the issues prior to the termination proceedings through social

Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976), adopted the reasoning of the district court in *Alsager*. Alabama allowed deprivation of parental rights based on a showing of neglect alone. It did not provide an immediate hearing following seizure of a child, even in nonemergency situations. Further, the state failed to provide representation for the child at any proceeding under its child welfare

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worker visits, mental health visits, and establishment of goals. In *Interest of Hochmuth*, 251 N.W.2d 484, 488 (Iowa 1977), the court noted that the Circuit Court of Appeals declined to reach the vagueness issue, and the Iowa court chose to review it itself. The *In re Hochmuth* court determined that the statute's language was adequately certain in that the parent had been provided notice of proscribed conduct nine months prior to the termination proceedings; as applied to the parent before the court, the language "was both specific and precise". *Id.* at 488. In *Long v. Long*, 255 N.W.2d 140 (Iowa 1977), where the parents had two years to correct conditions justifying termination of parental rights, the court determined that the statute in question had been fully elucidated and was constitutional as applied. Therefore, the parents' Fourteenth Amendment rights were protected under it. The court abandoned also the *Alsager* reasoning that the state had a more compelling interest in rescuing children from past mistreatment than in protecting them from future abuse or neglect, stating "we are required to determine the long-range as well as immediate interests of the child. In the same vein, this court has observed that parent-child termination proceedings are not like a tort action where injury must be proved before damages recovered. Our termination statute is preventative as well as remedial. It mandates action to prevent probable harm to children and does not require delay until after harm is done." *Long*, 255 N.W.2d at 143 (citations omitted). In *Interest of Lewis*, 257 N.W.2d 505, 510-11 (Iowa 1977), the court decided that the phrase at issue ("reasonable efforts under the direction of the court had failed to correct the conditions leading to the termination") was not unconstitutionally vague. The court decided in *Interest of Crooks*, 262 N.W.2d 786, 788 (Iowa 1978), that the statute was unconstitutionally vague as applied when the mother's parental rights were terminated in large part because she failed to attend counseling. Nowhere could the court find a direction of the juvenile court that the mother attend this service. Conversely, in *Interest of Kelley*, 262 N.W.2d 781 (Iowa 1978), filed separately on the same date by the same court as *Crooks*, the juvenile court had enunciated a program for remedying the conditions which led to the initial adjudication of neglect, and the termination of the father's parental rights was affirmed.

provisions. Additionally, the statutory scheme failed to recognize the rights of parents to be heard and contest termination proceedings. In each of these particulars, the Alabama statute was distinct from Washington's provisions.

In *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979), the court followed *Alsager* and cited *Roe*. The court declined to define "improper home" in the context, of a statute that allowed the appointment of a guardian with authority to consent to adoption. Again, Washington provides not only clarity in the statute but extensive case law interpreting the terms at issue in Wash. Rev. Code § 13.34.180(5).

In Washington, "conditions" to which the Wash. Rev. Code § 13.34.180(5) refers are the deficiencies of the parents and their unfitness to provide necessary care to the child.[13] Further, although the terms of Wash. Rev. Code § 13.34.180(5) are clear on the statute's face, case law in Washington has long recognized that language must not be viewed in a vacuum:

> "While it is true that what is 'proper parental care' or 'proper maintenance' is subject to value judgments, which may vary from person to person or from judge to judge, these expressions do not stand in isolation. If the statute is viewed as a whole,

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[13] The child is the individual child at issue in the case. Appellate courts have long held that each child welfare case must be decided on its own merits. *In re Aschauer*, 93 Wash. 2d at 695; *In re Ward*, 39 Wash. 2d 894, 895, 239 P.2d 560 (1952). "It is with the welfare of the children in mind that parental rights are examined." *In re Sego*, 82 Wash. 2d 736, 738, 513 P.2d 831 (1973). Washington has long recognized that children are not chattel; their rights must be protected as well as those of their parents. *E.g.*, *In re Harney*, 19 Wash. App. 85, 574 P.2d 395, *review denied*, 90 Wash. 2d 1015 (1978).

the language takes on substantial objectivity." *In re Aschauer*, 93 Wash. 2d at 697 (interpreting former Wash. Rev. Code §§ 13.04.010 and .140).

3. Wash. Rev. Code § 13.34.180(5) Is Not Unconstitutionally Vague

Wash. Rev. Code § 13.34.180(5) is not unconstitutionally vague when read in the context of its chapter and case law interpreting it. "Proof of statutory factor (5) requires a showing that, at the time of the termination hearing, there were parental deficiencies that [the parent] was unlikely to cure in the near future; that is, proof of then present parental unfitness." *In re S.V.B.*, 75 Wash. App. 762, 773-74, 880 P.2d 80 (1994). "Conditions" also include the ability of the child to be integrated into the family home. *In re K.R.*, 128 Wash. 2d at 145. They include the biological parents' "ability to shoulder parental responsibility and follow legal orders of the court". *Id.* at 146. In making the determination of ultimate fact under Wash. Rev. Code § 13.34.180(5), the trial court considers properly the child's attachments and bonds. *Id.* at 147.

"Proper care" has been defined in Washington by extensive case law setting forth parents' obligations to provide adequate care. Minimum obligations of parenthood include the expression of personal concern over the health and general well-being of the child, the duty to provide necessities (such as food, clothing, and medical care), and the duty to furnish appropriate guidance. *In re Adoption of Lybbert*, 75 Wash. 2d 671, 674, 453 P.2d 650 (1969).

In addition, parents have obligations to meet their child's emotional, physical, and developmental needs. *In re H.J.P.*, 114 Wash. 2d 522, 532, 789 P.2d 96 (1990); *In re Young*, 24 Wash. App. 392, 397, 600 P.2d 1312 (1979), *review denied*, 93 Wash. 2d 1005 (1980); *In re Schultz*, 17 Wash. App. 134, 141-42, 561 P.2d 1122 (1977) (parents were willing to let their child be raised in foster care, with no

foreseeable end in sight; the child was entitled to more than this). Expression and feeling of love toward the child, while significant, are not enough to satisfy the obligation to properly care for the child. *E.g.*, *In re Aschauer*, 93 Wash. 2d at 694; *In re Moseley*, 34 Wash. App. 179, 181, 660 P.2d 315, *review denied*, 93 Wash. 2d 1018 (1983). "When parental actions seriously conflict with the *mental or physical health* of their child . . . the State has the right and responsibility to intervene to protect the child." *In re Sumey*, 94 Wash. 2d 757, 762, 621 P.2d 108 (1980) (emphasis added); *accord* Wash. Rev. Code § 13.34.020.

The court may consider behavior and symptoms of a parent's mental illness that interfere with caring for the child. *E.g.*, *In re Chubb*, 112 Wash. 2d 719, 773 P.2d 851 (1989); *In re Ramquist*, 52 Wash. App. 854. The court considers evidence of mental disorder as a circumstance within the totality of circumstances. *In re Mauser*, 15 Wash. App. 231, 235, 548 P.2d 333 (1976). It may consider the parent's function after the parent is stabilized on medication, yet there is no indication of further improvement. *In re Moseley*, 34 Wash. App. at 186. The court may consider also relative stability at the time of the termination proceedings of parents who have periods of problems in functioning based on underlying mental illnesses or disorders. *Krause*, 47 Wash. App. at 736, 746-47. The parent's lack of insight into the condition may be considered. *Id.* at 747.

"While the State is barred from arbitrarily removing children merely because the parents are mentally ill, the mentally ill are not immune from having children removed if they are unfit." Pet. App. at A-15. A child should not be in the custody of parents whose mental illness renders them unable to understand or meet the child's needs. *In re Frederiksen*, 25 Wash. App. 726, 733, 610 P.2d 371 (1979), *review denied*, 94 Wash. 2d 1002 (1980); *In re Aschauer*, 93 Wash. 2d 689.

The circumstances at the termination proceedings cannot mirror those at the dependency proceedings in any exact manner, if only due to the passage of time.[14] Indeed, because termination decisions are predicated on current parental deficiencies (i.e., those at the time of the termination proceedings), the findings in the dependency are not of central importance; notably, under Washington's statutory proceedings, parental unfitness is re-established at the termination proceedings by proving all elements of Wash. Rev. Code § 13.34.180. *In re A.W.*, 53 Wash. App. at 29; *Krause*, 47 Wash. App. at 743; *In re Chubb*, 46 Wash. App. 530, 536-37, 731 P.2d 537 (1987); *see* Pet. App. at A-9, 10 (Court of Appeals discussion of this issue).

4. Wash. Rev. Code § 13.34.180(5) Was Applied Constitutionally In This Case

The trial court interpreted Wash. Rev. Code § 13.34.180(5) in a constitutional manner and relied on substantial evidence of a clear, cogent, and convincing nature

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[14] For example, the review process itself contemplates court oversight of evolving circumstances by mandating review hearings on a regular basis resulting in updated findings of dependency. Former Wash. Rev. Code § 13.34.130(5); *In re A.W.*, 53 Wash. App. at 28. Further, as in effect at the time of the proceedings below, Wash. Rev. Code § 13.34.145(1)(b) provided that "identified outcomes and goals of the permanency plan may change over time based upon the circumstances of the particular case". The permanent plan may identify alternative goals so as to maintain flexibility in meeting the ultimate goal of "securing a safe, stable, and permanent home for the child as soon as possible". Wash. Rev. Code § 13.34.145(1)(a). Additionally, Wash. Rev. Code § 13.34.120 assumes a fluid process in which the parties (including the parents) participate in planning over time. Wash. Rev. Code § 13.34.150 provides for changes to orders of the court "upon changes in circumstances". The working of these statutes was reflected in this case as permanency planning goals changed in response to the reality of the parents' progress and the child's development, review orders reflected progress or lack thereof, and orders were entered upon motions made by one party or another believing that changed circumstances required alteration of the status quo.

to make its ultimate findings regarding Wash. Rev. Code § 13.34.180(5). Indeed, while the petitioners attempt to construct a constitutional challenge, their basic complaint remains that they dispute the factual determinations and application of the law below.

The trial court recognized that the behaviors illustrating conditions of parental unfitness at the time of termination proceedings cannot be an exact reflection of those demonstrated years before at the initial dependency determination. Pet. App. at C-11, 12. Nonetheless, "[t]he termination was based on present inability to correct the parenting problems that were litigated throughout the dependency." Pet. App. at A-12 (citing *In re A.W.*, 53 Wash. App. at 29); *see also* Pet. App. at A-13 (additional explanation regarding notice and opportunity to be heard); Br. Opp'n App. A (sample review findings, conclusions, and order, in this case setting forth the dependency court's ruling regarding the issue of changed or evolving circumstances).

The trial court made explicit findings of current unfitness which were manifestations of the same basic deficiencies that supported removal of Hannah from her parents' home when she was an infant; these problems were litigated throughout the dependency. Pet. App. at A-12, 13. As found by the trial court, the parents continued to demonstrate significant deficiencies, despite ongoing availability of extensive services.[15] Pet. App. at C-2 to C-12. They were "unable to parent [Hannah] with little or no likelihood of change in the near and foreseeable future". Pet.

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[15] The parents contend they were limited to "State selected" services. Pet. at 8. While this may be the case in some dependencies throughout the United States, it was not the case here. Rather, "the Department in this case was willing to accept providers proposed by the parents in many instances". Pet. App. at C-2, 3. DSHS/DCFS followed recommendations of one of them to expand visits, but neither the parents nor the child could maintain the expansion. Pet. App. at C-13. The parents rejected the opportunity for an updated psychiatric evaluation by a provider acceptable to all parties. Pet. App. at C-6.

App. at A-7. The trial court found that "[t]here is little likelihood that conditions will be remedied so that the child could be returned to the parents in the near future." Pet. App. at A-5. It determined that this finding was based on clear, cogent, and convincing evidence. Pet. App. at A-4.

As when the dependency began, the parents were incapable at the time of the termination proceedings of meeting Hannah's basic needs for physical and emotional nurture (their deficits in the latter regard being more profound). As found by the trial court, "[c]hronic mental health issues interfere with the parents' abilities to meet the child's physical, emotional and developmental needs." Pet. App. at C-7. The court addressed as well the inability to cope (even with Hannah out of the home) that was an ongoing issue during the dependency: "Stress is a significant problem for both parents, and it becomes overwhelming at times for Mr. Swenson." Pet. App. at C-7. The parents' mental health problems were chronic (dating from well before Hannah was born) and included psychiatric hospitalizations. Pet. App. at C-7, 8. The court found further: "The parents['] own limitations will hinder them in addressing Hannah's developmental needs as she matures . . . and their limitations will make recognition of and response to Hannah's emotional needs particularly difficult." Pet. App. at C-8.

The trial court addressed directly the issues of current unfitness as they related to the problems identified in the dependency:

> "The pragmatic implications of the parents' mental illnesses rather than the precise label applied to them are of concern here. Here, the parents' impairments preclude them from meeting the child's emotional and developmental needs to such an extent that no court would return the child to her parents' home throughout the course of the dependency.

> *These inabilities continue to exist.* Although the parents try to follow the scripts they learn via parenting instruction, their mental illnesses manifest in a concrete, inflexible approach to dealing with new scenarios. The parents lack problem-solving abilities and abilities to respond to new, unforeseen and unscripted problems. These are the daily course of parenthood, as scripts for each situation that will confront the parents do not exist." Pet. App. at C-9 (emphasis added).

See also Pet. App. at C-8 (parents did not progress sufficiently during the dependency to meet the child's developmental and emotional needs over time); Pet. App at C-10, 11 (rigidity on the mother's part and passivity on the father's part). As was the case at the commencement of the dependency, the parents had not developed a bond with the child despite extensive visitation opportunities. Pet. App. at C-9, 10, 12-13.

In summary, as the Court of Appeals reiterated: "The issues underlying the termination are the same issues that were repeatedly litigated throughout: inability to meet the child's emotional and developmental needs, inability to respond outside the concrete, lack of flexibility and inability to react to new scenarios, and poor judgment." Pet. App. at A-13.

In the course of three and one-half years, the parents were unable to remedy the conditions of parental deficiency that made them incapable of providing adequate care for Hannah, despite infusion of multiple, appropriate services. The litigation herein evidences the full panoply of constitutional protections applied to the parents. There was no constitutional problem in the process justifying review by

this Court. Rather, the parents seek another opportunity to have the facts determined. That is not this Court's role.

CONCLUSION

The Petition For A Writ Of Certiorari should be denied.

RESPECTFULLY SUBMITTED.

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APRIL 3, 2000

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

JUVENILE DIVISION

IN RE DEPENDENCY OF: HANNAH SWENSON (DOB 11/25/92)	NO. 93-7-00117-0 DEPENDENCY REVIEW HEARING ORDER [X] PERMANENCY PLANNING REVIEW [X] CONTESTED

THIS MATTER came on for a contested review hearing April 16-17, 1996 before the undersigned court commissioner. The following were present for the hearing: Lorilei Swenson, the child's mother; Brent Swenson, the child's father; Tom May, the parents' attorney; Allen Gauper, attorney for intervenors (relatives with whom the child is placed); Mildred Staley, the child's court-appointed guardian ad litem; Mark Kamitomo, attorney for the child's GAL; Joe Reeves, Social Worker for the Department of Social and Health Services (DSHS), Division of Children and Family Services (DCFS); and Sylvia Glover, AAG, the agency's attorney.

Witnesses called by the parties and exhibits admitted by the court are as set forth in the clerk's minutes. The court having reviewed the files and records herein, and being fully advised in the premises, now makes the following:

I. FINDINGS

1.1 The child was found to be a dependent child pursuant to RCW 13.34.030[4] on June 16, 1993 as to the mother and on May 2, 1993 as to the father.

1.2 The child is currently placed in out of home care under the custody and supervision of DSHS/DCFS agency.

1.3 The agency plan is contested.

1.4 (a) The mother: has substantially complied with the court ordered services and responsibilities during the review period;

(b) The father: has substantially complied with the court ordered services and responsibilities during the review period;

(c) The child: has complied with the court ordered services: Assessment and counseling.

(d) The agency has complied with the court ordered services and all responsibilities: Provided case management, supportive casework services including in-home services and services for the child, referral to appropriate services, monitoring of child's placement and services.

1.5 Court supervision should continue.

1.6 A reason for removal of the child from his/her home as set forth in RCW 13.34.130(1) (b) continues to exist; and

Reasonable services have been provided or offered to the parties to facilitate reunion;

The child has been placed in the least restrictive setting appropriate to the child's needs and consideration has been given to placement with relatives. The child is placed with relatives, her paternal uncle and aunt (his wife). DSHS/DCFS acted correctly to place the child with relatives who have a history with the child and are available for her if permanent placement is required. The uncle and aunt were known to the child at the time of

placement, and she was comfortable with them then and remains so.

There is a continuing need for out of home placement and the placement recommended by the supervising agency is appropriate.

1.7 Looking to the dependency as a whole, progress has been made toward correcting the acute problems that necessitated the child's placement in out of home care. The issues are not currently those at issue when the child was removed from her parents' home, at which time the parents were as a result of their mental illnesses in great distress and seriously impaired in their ability to engage in activities of daily living. Although the parents have progressed in comparison to their issues at the time the dependency was established, they have reached a plateau and the court does not find continued progress.

1.8 Experts testifying herein are in conflict regarding the parents' diagnoses and prognoses. All agree the parents suffer from mental illness affecting their life functions seriously in the past and potentially in the future. The parents are currently on psychotropic medications, as they have been for the last several years; Both Dr. Manz and Dr. Clark testified that the medications are working well for Lorilie Swenson and Brent Swenson.

Dr. Manz (court ordered psychiatrist who examined the parents and child) and Dr. Clark (psychiatrist hired by the defense) disagreed about the parents' diagnoses. Concerning the issue of diagnoses or labeling of the parents' mental illnesses, psychiatry and diagnosis are not exact sciences and there is room for reasonable professionals to disagree. Neither Dr. Manz (diagnosing the parents as paranoid schizophrenic [with intermittent depression on Brent Swenson's part]) nor Dr. Clark (providing several differential diagnoses) have seen the parents in acute exacerbations of their illnesses, relying instead upon history and report. The court's concern about the accuracy of the historical diagnoses

of these parents does not negate Dr. Manz's analysis in any significant respect.

1.9 The real issue is not the label(s) of the parents' mental illness(es). Pragmatically, the finder of fact must look to how the mental illnesses of the parents manifest themselves and impact the child.

The court finds: The parents' skills and parenting practices were impaired at the time of removal and there is no question that removal was necessary; there is no claim herein of intentional abuse; the parents' have progressesd in basic functions.

The court finds further, however, that the parents' inability to meet the child's emotional and developmental needs required that the child remain out of the home. Although the parents follow the scripts they learn via parenting instruction, their mental illnesses manifest in a concrete, inflexible approach to dealing with new scenarios. The parents lack problem-solving abilities and abilities to respond new, unforeseen, unscripted problems. Such deficiencies are significant because new, unforeseen developments are the daily course of parenting. The problems of life are complex and sophisticated, and scripts for each situation that confronts the parents do not exist.

The court finds further that the parents exhibit lack of judgment as a manifestation of their mental illnesses. The mother in particular blurs boundaries between her role as parent and the role of playmate. Inadvertently, she either monopolizes activities, intrudes or makes herself a playmate. The mother's over-control of the child irritates and frustrates the child's development.

The court finds that the parents exhibit the inability to empathize and the inability adequately perceive cues as manifestations of their mental illnesses. They tend to oversimplify in their perception of parenting and the child's needs, and they are somewhat naïve. The parents' suggestion

that they should leave Spokane for Ellensburg or Wenatchee shows dramatic disregard for the needs of the child by failure to recognize her attachment to other family members who have been her caretakers. The parents do not recognize that the relative caretakers are the psychological parents to the child. The parents' failure to recognize the child's emotional needs places her at risk.

The court finds that Hannah's emotional needs and developmental needs would be unmet if she were returned to her parents' home. They cannot by force of educational or parenting programs develop the ability to engage in abstract or complex thought so as to engage their child. The parents cannot meet Hannah's needs for stimulation and emotional care. [*The parents cannot educate the child by modeling problem solving for problems.]

The child suffers confusion in having parents who cannot meet her emotional requirements or establish clear boundaries. The risks inherent in unclear boundaries include parent-child role confusion and parentification of the child. Confusion and role reversal are already apparent in the visitation schedule which (as the child's psychiatrist testified, among others) results in confusion about where she belongs and the roles of the adults in her life. Further, already, the child reverses roles during visits and improperly dictates outcomes.

The court finds that the paramount issue herein is potential trauma to the child if she is returned home. She is bonded to the relative caretakers who of necessity have provided care to her for most of her life. Uprooting Hannah would create high risk to her emotionally and developmentally, and it would turn her into a special needs child. The primary task of the dependency process is to serve the child's best interests. The Parents do not show the sensitivity to Hannah's needs or cues necessary to negate the trauma uprooting her would cause. These inabilities would cause her development to be derailed if she were returned home.

1.10 Visitation has occurred as follows during the review period: 5 days per week between July and the December 1995 order modifying visits; 3 half-days per week since December 1995—two visits at the Visitation Center, one at the parents' home. Some visits have been cancelled due to the child's illnesses. Visits since December have been supervised. James Mahoney, MSW, performed the court-ordered assessment of the visits and parent-child interaction.

Based on the testimony of the experts who work with the child, the child's guardian ad litem and social worker herein, the court finds concerning visits since the modification hearing in December 1995: Visits continue to stress the child, and this stress is expressed through behavior, petulance and weight loss. The present visitation schedule is harmful to the child and not in her best interests. Visits should be reduced and should take place in an environment providing the maximum sense of security for the child (such as the Visitation Center).

1.11 Additional services not previously ordered are not needed to facilitate return of the child to the parents. This case has been saturated with services since its beginning.

1.12 Permanency Plan

The permanency plan prepared by DSHS/DCFS is for: Stable and permanent home, now to be pursued via adoption by the uncle and aunt with whom the child is placed.

The permanency planning goal has not been achieved because reunification efforts were ongoing with concurrent planning.

The following need to be done to make it possible to achieve the primary goal: Resolve issues via termination of parental rights proceeding set for April 29, 1996.

[To the extent not inconsistent with the findings herein, the court incorporates its oral opinion by way of explanation of the findings.]

II. ORDER

21. The child remains a dependent child pursuant to RCW 13.34.030 (2) and DSHS/DCFS is the supervising agency.

2.2 The child shall not be returned home and shall remain in the care, custody and control of DSHS for placement.

Visitation shall occur between the parents and child as follows: One short visit per week (up to one hour); one longer visit per week (a minimum of two hours). Visits shall be supervised and at a location providing the maximum sense of security for the child, such as the Visitation Center.

2.3 Additional services shall occur between the parents and child as follows: No additional remedial services shall be offered. The parents shall engage in a psychiatric assessment with a provider acceptable to all parties, attention of the doctor to be directed to the parents' diagnoses and treatment regimens with mindfulness toward the effect change of regimen may have on the parents' stability (and, therefore, potential availability to Hannah). This service shall not be deemed a precondition to termination of parental rights nor shall engagement or failure to engage in it be used to postpone that proceeding.

2.4 PERMANENCY PLANNING REVIEW ORDER

The permanency plan prepared by DSHS/DCFS shall be implemented.

2.5 IT IS FURTHER ORDERED: The parents shall continue in their individual treatment for mental illness at Community Mental Health Center, Adult Services, and shall maintain use of their mediation as directed by their psychiatrist there. The parents shall return to the Child Abuse Project when they are deemed eligible for that program by its intake personnel; parents may re-engage in intake upon request to DSHS and CAP.

All services previously ordered which have not yet been successfully completed need to be completed by the appropriate parties. Periodic progress reports from the service providers shall be made available to the social worker, guardian ad litem and attorneys. The foster parents are allowed to travel up to two weeks out of state with this child, with prior notice to all parties. The foster parents may consent to any necessary medical or dental treatment during such trips.

The person or agency having custody of the child shall have full power to authorize and provide all necessary medical, dental or psychological care as recommended by the child's treating doctor or psychologist.

A non-contested review hearing shall be held on September 19, 1996 at 1:00 p.m. The parents shall appear for the hearing.

DATED this 26th day of April, 1996.

/s/J. Valente
COURT COMMISSIONER

Presented by:

/s/
SYLVIA GLOVER
Assistant Attorney General
WSBA #18285

COPY RECEIVED; APPROVED FOR ENTRY;
NOTICE OF PRESENTMENT WAIVED:

LORILEI SWENSON
Child's Mother

BRENT SWENSON
Child's Father

TOM MAY, Attorney for Parents

MILDRED STALEY
Child's GAL

[Approved by phone – per SG]
MARK KAMITOMO

/s/ (S. Glover for)
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Attorney for Intervenors

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Intervenor/Relative Caretaker

Notice: A petition for termination of the parent-child relationship pursuant to RCW 13.34.180 may be filed after six months of out of home placement pursuant to an order of dependency.

Notice: The violation of any restraining order or no-contact order set forth herein may constitute a criminal offense and a contempt of court.